FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
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ADVISORY OPINION 2005-01

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Dear Mr. Rogers:

We are responding to your advisory opinion request regarding the possible Federal contractor status of the Mississippi Band of Choctaw Indians ("the Tribe"), a Federally recognized Indian tribe, under the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations. The Tribe owns and controls IKBI, Inc. ("IKBI"), a Tribal corporation that intends to become a Federal contractor.

The facts indicate that IKBI can be treated as a separate entity from the Tribe and that the commercial activity of IKBI as a Federal contractor can be separated from the Tribe's political activities. IKBI's status as a Federal contractor will not make the Tribe a Federal contractor for purposes of the Act, and will not affect the Tribe's ability to make contributions to Federal candidates, political parties and political committees.

Background

The facts of this opinion are presented in your letter dated January 6, 2005.

The Tribe is a non-corporate entity organized in accordance with a constitution approved in 1975 by the Secretary of the Interior pursuant to 25 U.S.C. 476. *See* Advisory Opinion 1993-12. The Tribal constitution authorizes the creation of "organizations, including public and private corporations, for any lawful purpose, which may be non-profit or profit making, and to regulate the activities of such organizations by ordinance." Tribal Constitution, Article VIII, section 1(j).

The Tribe established and chartered IKBI in June 2004 as a for-profit Tribal "separate corporation." The Tribe provided approximately $ 468,000 in initial and supplemental capitalization to IKBI. The purpose of IKBI is to "compete for and perform construction contracts and any other lawful purpose consistent with [its] charter." IKBI Charter, Article VII, section A.

IKBI is governed by its board of directors, which is elected by its sole shareholder, the Choctaw Development Enterprise ("CDE"), acting on behalf of the Tribe. *Id*. at section B. CDE, in turn, is operated and managed by its five-member enterprise board, which is appointed by the Tribal Council with Tribal Chief and the Tribal Secretary – Treasurer serving as the enterprise board's Chairman and Treasurer, respectively.[1]

IKBI's board of directors manages the business and affairs of the corporation; however, the Tribal Council retains the authority to issue shares of the IKBI stock. *Id*. at section C(9). Board members must be members of the Tribe, but no member of the Tribal Council may serve on the board. *Id.* at section(C)(1). The board has the authority to waive the sovereign immunity of the corporation, but not the sovereign immunity of the Tribe or any other Tribal entity or enterprise. *Id.* at section C(9). The board elects and removes officers of the corporation and authorizes the officers to enter into contracts on the corporation's behalf. *Id.* at sections D(1) and (3) and section F.

IKBI has its own tax identification number separate from that of the Tribe. It maintains office space and records separate from the Tribe and has its own bank account separate from the Tribe. You state that IKBI leases or owns its own property. It has its own corporate employees and personnel policies, and it provides employee benefits separate from the Tribe. Finally, IKBI has separate legal counsel.

IKBI is a construction company and most of its planned work consists of construction projects for the U. S. Government or Federal agencies. IKBI intends to seek both sole source and competitive bid contracts with various Federal agencies, including the General Services Administration and the Federal Aviation Administration. These contracts will be funded with Federally appropriated funds.

For all its construction projects, both Federal and non-Federal, the owner/purchaser will require IKBI to obtain a standard performance bond from a reputable bonding company and, in some instances, a bid bond and payment bond as well. As a condition for issuing the bonds, the bonding agent will require the Tribe, (through CDE as the sole stockholder of IKBI), to sign an "agreement of indemnity." This obligates the Tribe (through CDE) to act as co-indemnitor (along with IKBI) for any losses and liabilities on the bonds. As a startup company, IKBI has neither sufficient in-

[1] CDE was created in November 1997, to engage in residential, commercial and institutional construction. CDE is not a "separate legal entity" but is an "arm of the Tribe." *See* Tribal ordinance No. 56.

house financial resources nor a sufficient proven construction track record to enable it to obtain the requisite bonds on its own.

Question Presented

Will the Tribe's relationship to IKBI, including its role as co-indemnitor on bonds related to Federal contracts, make it a Federal contractor for purposes of the Act and Commission regulations?

Legal Analysis and Conclusion

No, because of IKBI's distinct and separate identity from the Tribe, the status of IKBI as a Federal contractor, even within the context of the indemnification agreement, does not make the Tribe a Federal contractor.

The term "person" as defined in the Act includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government. 2 U.S.C. 431(11). The Tribe, which is an unincorporated entity, is a " person" under the Act. *See* Advisory Opinion 1993-12. As a corporation, IKBI is also a "person" under the Act. 2 U.S.C. 431(11).

Under 2 U.S.C. 441c, it is unlawful for any person who is a Federal contractor "directly or indirectly to make any contribution of money or other things of value, or to promise expressly or impliedly to make any such contribution to any political party, committee, or candidate for public office." *See also* 11 CFR 115.2(a). This prohibition extends from the commencement of the contract negotiations until the completion of the contract performance or the termination of negotiations. 11 CFR 115.1(b), 115.2(b).

Under 2 U.S.C. 441c(a)(1) and Commission regulations at 11 CFR 115.1(a), a "Federal contractor" is a person who:

> (1) Enters into any contract with the United States or any department or agency thereof either for—
> (i) The rendition of personal services; or
> (ii) Furnishing any material, supplies, or equipment; or
> (iii) Selling any land or buildings;
> (2) If the payment for the performance of the contract or payment for the material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress.

Under 11 CFR 115.1(c), the term "contract" includes:

> (1) A sole source, negotiated, or advertised procurement conducted by the United States or any of its agencies;

(2) A written (except as otherwise authorized) contract, between any person and the United States or any of its departments or agencies, for the furnishing of personal property, real property, or personal services; and
(3) Any modification of a contract.

The request describes IKBI's proposed transactions with the Federal governments as "contracts." For purposes of this advisory opinion the Commission assumes, therefore, that these are the type of agreements described in 11 CFR 115.1(c). When IKBI qualifies as a Federal contractor, 2 U.S.C. 441c and 11 CFR 115.2 will prohibit it from making contributions. This advisory opinion considers whether that prohibition extends to the Tribe as well.

In two advisory opinions the Commission has considered whether the Federal contractor status of subordinate tribal enterprises limits the ability of Indian tribes to make contributions. *See* Advisory Opinions 1999-32 and 1993-12. The Commission concluded that if circumstances demonstrate that the tribal enterprise has a distinct and separate identity from the Indian tribe itself, then the Act does not prohibit a tribe from making contributions because of the Federal contractor status of the tribal enterprise. *See* Advisory Opinion 1999-32.

The facts in this request are substantially similar to the facts considered in Advisory Opinion 1999-32. As in Advisory Opinion 1999-32, circumstances indicate that IKBI is a separate and distinct entity from the Tribe. These include the separate incorporation of IKBI, the separate leasing and ownership of property, the fact that no member of the Tribal council may serve on the IKBI board, and that IBKI has a separate legal counsel, bank account, tax identification number and separate employees, personnel and benefit policies from the Tribe. Further, as in Advisory Opinion 1999-32, funds from the Tribal enterprise that is a Federal contractor are not intermingled with other Tribal funds. The Commission notes that revenues from IKBI may not be used to make contributions to Federal candidates or political committees.

Accordingly, when IKBI qualifies as a Federal contractor, its status as Federal contractor does not confer Federal contractor status on the Tribe and therefore will not affect the Tribe's political activities under 2 U.S.C. 441c. The Tribe may continue to make contributions as a "person" under the Act subject to the condition that revenues from IKBI may not be used to fund these contributions. *See* Advisory Opinion 1999-32.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures (Advisory Opinions 1999-32 and 1993-12)

ADVISORY OPINION 2005-01

DISSENTING OPINION OF VICE CHAIRMAN MICHAEL E. TONER AND COMMISSIONER DAVID M. MASON

Advisory Opinion ("AO") 2005-01 arises from a request by the Mississippi Band of Choctaw Indians ("Tribe"), which owns and controls IKBI, Inc., a Tribal entity seeking to be a federal contractor. AO 2005-01 at 1. The issue is whether the Tribe's relationship to IKBI will make the Tribe itself a federal contractor under the Federal Election Campaign Act ("FECA") and Federal Election Commission ("Commission") regulations. *Id.* at 4; *see* 2 U.S.C. § 441c (1980); *see also* 11 C.F.R. § 115 (1976).

The Commission's Conclusion

In considering whether the Tribe's relationship to IKBI will make the Tribe itself a federal contractor, the Commission cites AO 1993-12 and AO 1999-32, which considered federal-contractor status and Indian tribes. The Commission states that if the federal-contractor tribal enterprise – here, IKBI – is separate and distinct from the tribe itself, then the tribe itself is not a federal contractor and may make contributions. *See* AO 2005-01 at 5 (citing AO 1999-32). The Commission concludes that IKBI is separate and distinct from the Tribe, because:

- IKBI is separately incorporated.
- It separately leases and owns property.
- No Tribal council member may be on the IKBI board.
- IKBI has a separate legal counsel, bank account, tax-identification number, plus separate employees, personnel policies, and benefit policies, and
- IKBI money does not intermingle with other Tribal money.

Id. at 5-6. Accordingly, the Commission concludes the Tribe is not a federal contractor. Therefore, it may make contributions, *id.* at 6 (citing 2 U.S.C. § 441c), as long as it does not use IKBI revenues. *Id.* (citing AO 1999-32).

The Tribe as a Federal Contractor

Because the Commission's conclusion is mistaken, we respectfully dissent.

AO 1999-32 also considered federal-contractor status and Indian tribes, and concluded that a tribe was not a federal contractor. But AO 1999-32 is different from AO 2005-01, and the Commission should reach a different result.

First, the Commission should not overlook the background or the recent developments in the news. The tribe at issue in AO 1999-32 provided utility services to the federal Bureau of Indian Affairs ("BIA") and Indian Health Services ("IHS") offices on the tribe's reservation. While there is no scandal of which we are aware involving that tribe, recent developments in the news concern tribal political activity, including contributions by tribes. Most recently, for example, the Michigan Saginaws received a congressional appropriation for a school, and made contributions at about the same time Congress was considering the appropriations bill. *See* Susan Schmidt, *Tribal Grant Is Being Questioned,* WASH. POST, March 1, 2005, at A3. While many entities frequently make similarly timed contributions, one purpose of campaign-contribution limits in general and the federal contractor prohibition in particular is to reduce the opportunity for *quid pro quo* transactions. The reason is that if contributions are small enough, then the harm that comes from them can be reduced. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 26-29 (1976) (discussing contribution limits). Given these news reports – plus the recent ones involving Jack Abramoff – tribal contributions, and the political role tribes play, have become a major and controversial issue that the Commission should not set aside in setting policy.

That is not to say, of course, that the Commission should punish the Mississippi Choctaws for the alleged sins of the Michigan Saginaws or of Mr. Abramoff. Nevertheless, one aspect of AOs is that while the Commission issues them to particular requestors, they apply to other similarly situated parties. *See* 2 U.S.C. § 437f (1986). Thus, it is appropriate to note that political activity of many tribes has been the subject of controversy. Moreover, the connection between contributions and the appropriations process has raised substantial questions.[2] The Commission should not ignore this background by referring generally to policy or historical reasons for liberal construction of statutes applied to tribes.[3] Rather, the Commission has compelling reason to tread carefully when construing statutes designed to limit inappropriate political activity as

[2] That the Mississippi Choctaws or other tribes are represented as victims in certain other controversies is no reason to restrict the application of statutes designed to prohibit inappropriate contributions. Similar to the Municipal Securities Rulemaking Board (and state) "pay-to-play" prohibitions, the federal-contractor prohibition serves as much to insulate contractors from inappropriate requests for contributions as to limit offers by contractors to politicians.

[3] The requestor asserts that the "Supreme Court has repeatedly articulated a principle for resolving issues in such circumstances: statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Letter of Bryant Rogers, Counsel for the Requestors, to Rosemary Smith, Associate General Counsel, at 5 (March 8, 2005) (citations omitted).

applied to Indian tribes, particularly those that enter into government contracts with the federal government.

Second, AO 1999-32 involved the establishment of utilities for the reservation itself. Although on-reservation BIA and IHS offices received utility services, that was incidental to the tribe's purpose in establishing an electric utility. While one court decision seemed to conclude that electric companies providing electricity to federal agencies were federal contractors, and thus were bound by civil-rights laws, there was no threat that the AO 1999-32 tribe's federal-contractor status would represent an incentive for the tribe to make, or politicians to seek, political contributions.

By contrast, in AO 2005-01, the Tribal ownership of the corporation is absolutely essential to its business, which may operate exclusively as a government contractor. IKBI maintains it is qualified as a "small" and "disadvantaged" business under the federal Small Business Administration ("SBA"). If the Tribe did not own IKBI, IKBI could not make that claim. As a result of its status, IKBI will compete for business throughout the country. Thus, the Tribal relationship is essential to the corporation's business plan, and the corporation will carry out its business plan far outside the reservation, far outside its immediate confines, and in ways having nothing to do with the welfare – other than economic development – of Tribe members.

The IKBI-Choctaw business plan bears directly on the reason for the federal-contractor ban, namely that Congress did not want federal contractors to take money from those contracts and plow it back into the political system to get even more federal contracts. *Cf.* 2 U.S.C. § 441c(a). Yet protecting and expanding its federal-contracting opportunities will be one of the primary interests behind Tribal contributions once IKBI becomes a federal contractor.

AO 1993-12 also bears on the main reason for the ban on federal-contractor contributions. AO 1993-12 considered three agreements between the federal government and, coincidentally, the Mississippi Band of Choctaw Indians, the same Tribe before the Commission in AO 2005-01. The Commission held that the first and second agreements were not contracts under 2 U.S.C. § 441c(a), but the third agreement was. Under the third, the Tribe itself provided posters and prints to the BIA. Had the Commission held that the Tribe was not a federal contractor, it could have taken money from its federal contracts and plowed it back into the political system to get even more federal contracts. *Cf.* 2 U.S.C. § 441c(a).

Finally, in finding that the contractor ban did not apply to the requesting tribe in AO 1999-32, the Commission held as an essential element of its analysis the absence of financial links between the Tribe and the Tribal Utility Authority. Here, the Choctaws' indemnification agreement represents a material linkage between the tribe and the corporation. Thus, in its desire to accommodate this request, the Commission is not following its prior AOs, but departing from them.

PAC Option

The law does allow federal contractors to establish separate segregated funds, *see* 2 U.S.C. § 441c(b), also known as political action committees ("PACs"). More importantly, there is a material difference between going to owners or executives – whether they are Tribal members or IKBI employees – and asking them to take money out of *their own pockets* and contribute it to a PAC, and taking the money out of *the federal contractor's revenues* and using it to make contributions. The former is legal, *see, e.g., id.* § 441c(b), while the latter is not. *See id.* § 441c(a). Having a PAC, or even having two PACs – one for IKBI and one for the Tribe – would allow the Tribe to continue to play a role in the political process, yet the Tribe would not be able to fund its political activities out of the fisc of the contractor.

While the Commission does provide that the Tribe may not make contributions using IKBI revenue, *see* AO 2005-01 at 6, that separation may prove illusory because money is fungible. When IKBI profits go back to the Tribe, it will be able to use IKBI money for such items as schools and roads, which is commendable, but then the Tribe will be able to use money it otherwise would have used for schools and roads to make political contributions. The accounting separation will not have a material effect.

Business and Politics, Native Americans, and Consistency

Other Members of the Commission assert that the Tribe should not have to choose between being a business entity and being in the political arena. The Tribe need not choose between being a business entity and being in the political arena. However, it must choose between being a federal contractor and making federal contributions. *See* 2 U.S.C. § 441c(a). The issue in this AO is whether the Tribe as a business entity is a federal contractor. *See* AO 2005-01 at 4. As a federal contractor, it may not make contributions, *see* 2 U.S.C. § 441c(a), yet IKBI may establish a PAC, *see id.* § (b), through which others may make contributions. *See, e.g., id.* § 441b(b)(4).

Finally, one Member of the Commission is correct in urging the Commission to be sensitive to the fact that, by holding that the Tribe is a federal contractor, the Commission would reach a different result than it reached in AO 1999-32, and would reach a result more like the one in AO 1993-12. However, different facts can legitimately lead to different conclusions. Here they do. For the foregoing reasons, the Commission should distinguish AO 2005-01 from AO 1999-32 and hold that the Tribe will be a federal contractor under FECA.

_____ _____(signed)_____
Date Michael E. Toner, Vice Chairman

_____(signed)_____
Date David M. Mason, Commissioner